

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EDMUND BRYAN,	:	
	:	No. 07 Civ. 7300 (SHS)
Plaintiff,	:	ECF CASE
-against-	:	
MEMORIAL SLOAN-KETTERING CANCER	:	AFFIDAVIT OF
CENTER,	:	<u>KATHERINE D. KALE, ESQ.</u>
	:	
Defendant.	:	
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State of New York)
) ss.:
County of New York)

KATHERINE D. KALE, ESQ., being duly sworn, hereby deposes and says:

1. I am an associate with the law firm of McDermott Will & Emery LLP, counsel for defendant Memorial Sloan-Kettering Cancer Center ("Defendant" or the "Center"). I work under the supervision and direction of Joel E. Cohen, Esq., ("Mr. Cohen") a member of McDermott Will & Emery LLP, and lead counsel in the above-referenced action.

2. I submit this affidavit in support of the Center's motion for sanctions pursuant to FED. R. CIV. P. 37(d), in response to plaintiff Edmund Bryan's ("Plaintiff") failure to appear for his scheduled deposition on April 14, 2008. I have personal knowledge of the facts submitted herein.

3. Plaintiff's deposition was initially scheduled for March 5, 2008. (Attached hereto as Exhibit 1 is a true and correct copy of the Notice Of Deposition Of Plaintiff Edmund Bryan for March 5, 2008.) Plaintiff failed to timely respond to Defendant's document requests prior to such date. On February 26, 2008, I sent a letter to Plaintiff's counsel adjourning Plaintiff's

deposition until such time as Defendant received and reviewed his document responses, which responses were eventually received on March 10, 2008. (Attached hereto as Exhibit 2 is a true and correct copy of my February 26, 2008 letter, omitting the enclosure.)

4. On March 12, 2008, I had a telephone conversation with Plaintiff's counsel wherein we discussed dates for Plaintiff's, and other witnesses', depositions. I proposed either April 14th or April 15th for Plaintiff's deposition. Plaintiff's counsel stated he was available on either date, and we initially agreed to hold Plaintiff's deposition on April 15, 2008. However, the following day, I learned of a conflict with April 15th, and issued the formal notice of deposition (the "Notice") for April 14, 2008, which was the alternative date Plaintiff's counsel and I discussed. (Attached hereto as Exhibit 3 is a true and correct copy of the Notice Of Deposition Of Plaintiff Edmund Bryan for April 14, 2008.) To avoid confusion as to the date of Plaintiff's deposition, in my cover letter enclosing the Notice, I bolded the date of the deposition and explained reason for the change. I also asked Plaintiff's counsel to notify me immediately if he was no longer available on April 14th. (Attached hereto as Exhibit 4 is a true and correct copy of my March 17, 2008 letter.) Plaintiff's counsel did not notify me that he was no longer available on April 14th.

5. On April 1, 2008, I sent a letter to Plaintiff's counsel regarding a number of outstanding discovery issues that needed to be resolved prior to Plaintiff's deposition. The letter clearly stated that Plaintiff's deposition was scheduled for April 14, 2008. (Attached hereto as Exhibit 5 is a true and correct copy of my April 1, 2008 letter.)

6. On Friday, April 11, 2008, I sent Plaintiff's counsel an email reminding him of Plaintiff's deposition on Monday, April 14th, and providing him instructions as to where to go when he arrived at the office. (Attached hereto as Exhibit 6 is a true and correct copy of my

April 11, 2008 email.) On Sunday, April 13th, at approximately 2:30 p.m., Plaintiff's counsel responded to my April 11th email stating that he had Plaintiff's deposition scheduled for April 15, 2008. (Attached hereto as Exhibit 7 is a true and correct copy of Plaintiff's counsel's April 13, 2008 email.) I immediately replied to Plaintiff's counsel's email clarifying that Plaintiff's deposition was scheduled for April 14th, and not April 15th, as his email suggested. (Attached hereto as Exhibit 8 is a true and correct copy of my April 13, 2008 email.) As it was unclear from Plaintiff's counsel's email whether Plaintiff's would appear as scheduled, I requested confirmation by 6:00 p.m. as to whether Plaintiff's deposition would go forward on April 14th. I did not hear back from Plaintiff's counsel. I then called Mr. Cohen to discuss the status of the deposition. I also called Pamela Dudley ("Ms. Dudley"), the Employee Relations Specialist from the Center, who was planning on attending Plaintiff's deposition and notified her of these events.

7. On April 13th at 6:00 p.m., having not heard back from Plaintiff's counsel, I called his office and left a voice mail message inquiring as to the status of the deposition. Later that evening, I left messages for Mr. Cohen and Ms. Dudley updating them as to the status of Plaintiff's deposition.

8. On the morning of April 14th, I left a second message for Plaintiff's counsel. Finally, at approximately 9:30 a.m. -- thirty minutes before the scheduled start of Plaintiff's deposition -- Plaintiff's counsel returned my calls and officially cancelled Plaintiff's deposition. During our conversation, Plaintiff's counsel conceded responsibility for the cancellation, explaining that he had calendared Plaintiff's deposition for April 15th and had disregarded the date on the Notice and my subsequent correspondence. Immediately thereafter, I called the court reporting agency and cancelled the court reporter. I later received an invoice in the amount of

\$175.00 as the cancellation fee. (Attached hereto as Exhibit 9 is a true and correct copy of the invoice from Classic Reporting, Inc.) Plaintiff's deposition is re-scheduled for April 21, 2008.

9. In connection with the above-described events, I billed the following amounts to the Center: drafting email response to Plaintiff's counsel attaching previous correspondence regarding Plaintiff's deposition date (.5); conferring with Mr. Cohen and Center representative regarding status of the deposition (.4); leaving two separate voice mail messages for Plaintiff's counsel regarding status of the deposition (.2); and cancelling court reporter and re-scheduling the deposition (.8). My time is billed to the Center at the rate of \$405.00 per hour. I also reviewed Mr. Cohen's billing records, which indicate that he spent 4 hours preparing for Plaintiff's deposition. Mr. Cohen's time is billed to the Center at the rate of \$755.00 per hour.


KATHERINE D. KALE

Sworn to before me this
17th day of April 2008


Notary Public

Leila Rachele Pittaway
Notary Public - State of New York
Qualified in Kings County
Reg. #02PI6154921
Commission Expires: 10/23/2010

NYK 1156300-1.034164.0066

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EDMUND BRYAN,	:
	:
Plaintiff,	:
	:
-against-	:
	:
MEMORIAL SLOAN-KETTERING CANCER	:
CENTER,	:
	:
Defendant.	:
-----	X

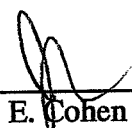
No. 07 Civ. 7300 (SHS)
ECF CASE
**NOTICE OF DEPOSITION OF
PLAINTIFF EDMUND BRYAN**

PLEASE TAKE NOTICE that pursuant to Federal Rules of Civil Procedure 26 and 30, defendant Memorial Sloan-Kettering Cancer Center, by its attorneys, McDermott Will & Emery LLP, will take the deposition of plaintiff Edmund Bryan, beginning at 10:00 a.m. on March 5, 2008. Said deposition will be held at the offices of McDermott Will & Emery LLP, 340 Madison Avenue, New York, New York 10173.

Dated: New York, New York
January 15, 2008

McDERMOTT WILL & EMERY LLP

By: _____


Joel E. Cohen (JC 5312)
Katherine D. Kale (KK 7586)
340 Madison Avenue
New York, NY 10173
(212) 547-5400

Attorneys for Defendant
Memorial Sloan-Kettering Cancer Center

TO: A. Baraka Scott
The Scott Firm
55 Washington Street, Suite 705
Brooklyn, New York 11201

Attorney for Plaintiff

EXHIBIT 2

McDermott Will & Emery

Boston Brussels Chicago Düsseldorf London Los Angeles Miami Munich
New York Orange County Rome San Diego Silicon Valley Washington, D.C.
Strategic alliance with MWE China Law Offices (Shanghai)

Katherine D. Kale
Associate
kkale@mwe.com
212.547.5689

February 26, 2008

VIA ELECTRONIC MAIL AND FIRST-CLASS MAIL

A. Baraka Scott, Esq.
The Scott Firm
55 Washington Street, Suite 705
Brooklyn, NY 11201

Re: Edmund Bryan v. Memorial Sloan-Kettering Cancer Center
Civil Action No.: 07 Civ. 7300 (SHS)

Dear Mr. Scott:

I am writing regarding Plaintiff's failure to respond to Defendant's First Request for the Production of Documents, which responses were due on February 17, 2008. Please immediately furnish your responses to said requests and, to the extent any document request requires the production of medical information, please see that Mr. Bryan completes the previously provided medical authorization form. For your convenience, another copy of that form is attached hereto.

In addition, because Defendant has yet to receive Plaintiff's discovery responses, it will be unable to proceed with his March 5, 2008 deposition. Nonetheless, Defendant reserves its right to take Plaintiff's deposition before that of any other witness in this case. Please contact me to confirm a new date for Plaintiff's deposition.

Very truly yours,



Katherine D. Kale

Enclosure

EXHIBIT 3


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
EDMUND BRYAN, :
 :
 Plaintiff, : No. 07 Civ. 7300 (SHS)
 :
 -against- : ECF CASE
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 MEMORIAL SLOAN-KETTERING CANCER : **NOTICE OF DEPOSITION OF**
 CENTER, : **PLAINTIFF EDMUND BRYAN**
 :
 Defendant. :
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Dated: New York, New York
March 17, 2008

McDERMOTT WILL & EMERY LLP

By: 
Joel E. Cohen (JC 5312)
Katherine D. Kale (KK 7586)
340 Madison Avenue
New York, NY 10173
(212) 547-5400

Attorneys for Defendant
Memorial Sloan-Kettering Cancer Center

TO: A. Baraka Scott
The Scott Firm
55 Washington Street, Suite 705
Brooklyn, New York 11201

Attorney for Plaintiff

EXHIBIT 4

McDermott Will & Emery

Boston Brussels Chicago Düsseldorf London Los Angeles Miami Munich
New York Orange County Rome San Diego Silicon Valley Washington, D.C.
Strategic alliance with MWE China Law Offices (Shanghai)

Katherine D. Kale
Associate
kkale@mwe.com
212.547.5689

March 17, 2008

VIA FIRST-CLASS MAIL

A. Baraka Scott, Esq.
The Scott Firm
55 Washington Street, Suite 705
Brooklyn, NY 11201

Re: Edmund Bryan v. Memorial Sloan-Kettering Cancer Center
Civil Action No.: 07 Civ. 7300 (SHS)

Dear Mr. Scott:

Enclosed please find the Notice of Deposition of plaintiff Edmund Bryan scheduled for **Monday, April 14, 2008**, beginning at 10:00 a.m. Please note that, during our discussion of possible deposition dates last week, I was unaware that Mr. Cohen has a previously scheduled conflict on April 15th. As such, we have noticed Mr. Bryan's deposition for April 14th, which is the other date that we discussed. Please contact me immediately if you are no longer available on April 14th.

Additionally, this letter confirms that the depositions of John Meggs, Sheila Donoghue, Rupert Gillette and Miguel Ruiz will be held on April 24, April 28 and/or April 29. Please let me know as soon as you have determined the exact dates and times for each witness so that we may inform Ms. Donoghue, Mr. Gillette and Mr. Ruiz.

Very truly yours,



Katherine D. Kale

Enclosure

NYK 1151560-1.034164.0066


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EDMUND BRYAN, :
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 Plaintiff, : No. 07 Civ. 7300 (SHS)
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 MEMORIAL SLOAN-KETTERING CANCER : **NOTICE OF DEPOSITION OF**
 CENTER, : **PLAINTIFF EDMUND BRYAN**
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Dated: New York, New York
March 17, 2008

McDERMOTT WILL & EMERY LLP

By: 
Joel E. Cohen (JC 5312)
Katherine D. Kale (KK 7586)
340 Madison Avenue
New York, NY 10173
(212) 547-5400

Attorneys for Defendant
Memorial Sloan-Kettering Cancer Center

TO: A. Baraka Scott
The Scott Firm
55 Washington Street, Suite 705
Brooklyn, New York 11201

Attorney for Plaintiff